No. 4112

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HON WON CHONG and GEE SUE TOM,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR, GEE SUE TOM.

J. H. SAPIRO,
C. A. A. MCGEE,
Attorneys for Plaintiff in Error,
Gee Sue Tom.

No. 4112

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HON WON CHONG and GEE SUE TOM,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR, GEE SUE TOM.

Statement of Fact.

THE INDICTMENT.

Plaintiffs in error in this case were prosecuted under Section 5540 U. S. Revised Statutes, the offence charged being a conspiracy to violate the Harrison Narcotic Act, being the Act of Congress of December 17, 1914, as amended February 24, 1919.

Indictment No. 11132 is set forth in full on pages 2 to 5 inclusive of the transcript of record and alleges in substance that the plaintiffs in error did

> "wilfully conspire to unlawfully possess certain narcotic drugs which did not then and there bear and have affixed thereon appropriate tax paid stamps as required by the Act of Congress."

The overt act alleged is

> "that the said defendants and each of them, did, unlawfully, possess certain packages of narcotic drugs which did not then and there bear and have affixed thereon appropriate tax paid stamps as required by the aforesaid Act of Congress."

Indictment No. 11785 is set forth in full on pages 5 to 9 of transcript—was identical with indictment No. 11132 with the following additions:

> "Said defendants then and there being persons required to register and pay a tax under the provisions of the act aforesaid as amended, and said defendants not then and there having registered under the provisions of said act, and not then and there having paid the special tax provided for by the aforesaid act on said smoking opium, cocaine and morphine."

The overt act was set out in the following language,

> "said defendants did unlawfully, wilfully, and feloniously have in their possession a certain derivative of cocoa leaves, and a certain preparation and derivative of opium and morphine, said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid act on the said cocaine, smoking opium and morphine."

At p. 9 the defendants enter a plea of "not guilty" to indictment No. 11132.

At p. 11 the defendants enter their plea of "not guilty" to indictment No. 11785.

At p. 11, indictment No. 11132 is brought on for trial.

At p. 57, defendants object to the introduction of any testimony under the indictment on the grounds that the same does not state facts sufficient to charge a public offense, and move to quash for the same reason. Motion denied, exception saved.

At pp. 79 to 81 inclusive, defendants move the Court to instruct the jury for a directed verdict on the ground that the evidence adduced failed to prove a conspiracy as charged in the indictment.

At pp. 82 to 88 defendants renewed the motion to quash the indictment on the ground that the same does not state the facts sufficient to charge a public offense and because the said indictment does not set forth how or in what manner the alleged possession of said narcotics was unlawful.

At p. 85, the District Attorney admits that indictment No. 11132 is defective and moves the Court that the motion of defendant's counsel to quash be denied and that indictments No. 11132 and No. 11785 be consolidated.

At p. 88 trial Court denied the motion to dismiss the first indictment and granted the motion of the District Attorney to consolidate the two indictments for trial *nunc pro tunc* as of the beginning of the trial, exception saved by defendants.

At p. 90 the defendants object to the reception of any testimony under indictment No. 11785 on the grounds heretofore urged against indictment No. 11132. Objection overruled, exception saved.

At p. 107 defendants again renewed the motion to quash the indictment or indictments on all the grounds heretofore named, and requested the Court to direct the jury to return a verdict for the defendants. Motion denied, exception saved.

At pp. 107 to 116 instructions of the Court and the exceptions taken thereto in the presence of the jury.

At pp. 116 to 121, inclusive, is set forth the motion in arrest of judgment.

At pp. 32 to 50, inclusive, is set forth the assignments of error on behalf of the defendants.

THE EVIDENCE.

To sustain its case against the defendants the Government produced several witnesses who testified substantially as follows: That on or about the first day of May, 1922, two Chinese checked a suitcase on a passenger ticket from the Oakland depot of the Western Pacific Railway Company to Reno, Nevada. The witness could not identify either of the defendants as a person who was present at the time of the issuance by him of a baggage check. This witness further testified that the person to whom he issued the baggage check signed a valu-

ation slip "F. T. Henry" which was put in evidence.

To sustain its case against the defendant Gee Sue Tom, the Government produced several witnesses who testified that the Government officers at Reno intercepted a letter addressed to "Gee Toy, c/o Chew Kee Co., 129 E. First Street, Reno, Nevada", and that it was delivered to 129 E. Front Street, Reno, Nevada. The defendant Gee Sue Tom was present at that address and was asked if he was Gee Toy and having said he was, he was handed the letter and simultaneously the Government agent took the letter (Government Exhibit 1) from Gee Sue Tom and the Government agent opened the letter and took out the baggage check. The Government agent then went to the depot at Reno and procured the suitcase containing the narcotics, upon presentation of baggage check. (Testimony of Haley, p. 64, transcript.)

There is no testimony that the defendant Gee Sue Tom was ever in the business of selling narcotics nor that he had any such reputation.

The letter accompanying the baggage check was written in Chinese and is set out on page 103 of the record and is addressed to Duck Sung, written by Jak Hing and states

> "Now I forward by railway express one suitcase and kindly get it. Inside contains 10 pieces wooden at 77, total $770.00, and 10 sacks of grain sugar at 23 total $230.00 and square sugar 5 boxes at 26, total $112.00, total

$1112.00, Please send me check for the above."

The Chinese on the face of the envelope was interpreted to read "deliver this to Duck Suy".

To sustain its case against the defendant Hon Won Chong the Government introduced the evidence of several witnesses as follows: A decoy letter was prepared in San Francisco addressed to F. T. Henry, 1040 Stockton Street, San Francisco, and was delivered by a special agent, under the guise of being a registered delivery. At apartment 38 of that address the defendant Hon Won Chong signed a receipt for said letter, using the name F. T. Henry. It is undisputed in the record and proved beyond any question from a comparison of the handwritings that the person who signed the name F. T. Henry on the valuation slip at Oakland on May 1st is not the same person who signed the registry receipt at 1040 Stockton Street, San Francisco, on May 9th. This in substance is the Government's case to prove the conspiracy and all the other material allegations of the indictment.

The defendant Gee Sue Tom testified that he was an employee in the car shops at Sparks, Nevada, about four miles from Reno, that he never had an interest in any store in Reno but that he resides adjoining the Chu Kee store which is owned by his brother-in-law. That he never knew J. T. Henry nor the defendant Hon Won Chong and that he never purchased any narcotics. That on the 3rd

of May, after his meal he went over to the store and took care of it while the proprietor went downtown to attend to some lease business. He states that the postman came in and said "Here is a letter for your store and the address is wrong." Before he opened the letter he was arrested and the letter taken from him. He claims to understand no English and did not at any time prior to or after May 1st agree to purchase or handle or possess either with the defendant or with a person by the name of Henry or anybody else any narcotics; specifically denied that he had ever used the name of or was known as Gee Toy, nor is there any proof that he was known by that name.

The defendant Hon Won Chong testified that he had been in this country about three months prior to May 1st. That being out of work he occupied the room of one F. T. Henry at 1040 Stockton Street, San Francisco. That Henry told him as he was going out of the city that he, Hon Won Chong, should receipt for any mail which would come to Henry, and presented him with a railway ticket for Reno, Nevada. This is the ticket on which the suitcase was checked to Reno. This defendant further testifies that he had never known or communicated with the other defendant and that he had never possessed or trafficked in narcotics or engaged in any business concerning narcotics, and had never used the name F. T. Henry or known by that name, nor is there any proof that he was known by that name.

It is of importance to note that at no time has it been shown that either of the defendants had ever been in communication with each other nor is there one single word of testimony to show that there was a conspiracy or agreement to violate the Harrison Narcotic law. That taking the testimony of the Government as true and uncontradicted it shows at the most evidence of transportation of narcotics between a person known as F. T. Henry and one Gee Toy and no satisfactory evidence that either of the defendants was one of the persons connected with that transportation.

SPECIFICATIONS OF ERROR RELIED ON.

In conformity with the provisions of subdivision 2 B rule 24 of this Court, we now set forth and specify separately and particularly, each error asserted and intended to be urged. The errors upon which we rely are as follows:

1.

The Court erred in denying the defendant's motion to quash the indictment on the ground that the indictment does not state facts sufficient to charge an offense against the laws of the United States. (Trans. pp. 58-59; p. 82.)

2.

The Court erred in overruling defendant's objection to the introduction of any testimony under the

indictment on the ground that the same did not state facts sufficient to charge an offense against the laws of the United States. (Trans. pp. 57-59.)

3.

That the trial Court erred in refusing to direct the jury to find a verdict of "not guilty" as to both defendants on the ground that no conspiracy had been proven. (Trans. pp. 80 and 107.)

4.

That the trial Court erred in granting the motion of the Government to consolidate indictment No. 11132 and indictment No. 11785, after the Government had rested its case in chief, and in making a *nunc pro tunc* order to that effect. (Trans. pp. 87 and 88.)

5.

That the trial Court erred in denying the motion to quash indictment No. 11785, or the consolidated indictment on the ground that the same does not state facts sufficient to charge an offense under the laws of the United States. (Trans. p. 89.)

6.

That the trial Court erred in instructing the jury as follows:

> "In this case there are two indictments. These indictments, however, charge but a single offense and upon them you can render but a single verdict, of either guilty or not guilty.

That is to say, you are for the (87) purpose of your verdict, to consider the second indictment as a mere amendment or correction of the first." (Trans. pp. 107-108; exceptions taken, p. 115.)

7.

The trial Court erred in charging the jury as follows:

"You are instructed in the first place, that under the Act of Congress mentioned in this indictment, it is a crime to have in possession opium, morphine, or cocaine, unless the person so having in possession has registered and paid the prescribed tax. There is no claim or pretense here that either of these defendants has registered or paid the tax, and, therefore, the possession of these drugs by either of them would constitute a crime against the United States. It is not necessary for the Government to show failure to register or pay the tax if it shows possession. In this connection, I instruct you that if you find that either of the defendants had in his possession a baggage check entitling him or them to the possession of the suitcase containing any of these drugs, then the possession of such check with knowledge of the contents of the suitcase and intent to procure the suitcase is, in law, the possession of the drugs. But these defendants are not charged with having the drugs in their possession. They are charged with a conspiracy so to do." (Trans. p. 108; exception taken, p. 115.)

8.

That the trial Court erred in overruling and denying the plaintiffs in errors' motion in arrest

of judgment for the reason that the indictment or indictments failed to charge the defendants therein named with any crime against the United States, but, on the contrary, the indictment or indictments show affirmatively that the things which defendants are alleged to have done do not constitute any crime against the United States. (Pars. 1, 2, 3, 4, and 6, pp. 21-22 of Trans.)

9.

That the trial Court erred in overruling and denying the motion of plaintiffs in error, in arrest of judgment for the reason that the evidence does not prove or tend to prove that there ever was a conspiracy or agreement as alleged in the indictment. (Pars. 7, 8, 9, 10, 11, p. 24, Trans.)

Argument.

NEITHER INDICTMENT NO. 11132 NOR INDICTMENT NO. 11785 ARE SUFFICIENT AND ARE FATALLY DEFECTIVE.

Under this point we will discuss specifications of errors Nos. 1, 2, 5, 6, and 8.

It will be noted that indictment No. 11132 merely charges that the defendants unlawfully conspired to commit the acts made offense by the so-called Harrison Narcotic Act and that at a certain time and place the defendants unlawfully conspired

> "to unlawfully, willfully and feloniously have in their possession certain narcotic drugs,

> which said narcotic drugs did not then and there bear and have affixed thereon appropriate tax paid stamps as required by the aforesaid Act of Congress."

It will be noted that there was no allegation that the defendants were persons who were required to register and had failed to register. There can be no pretense by anyone that this indictment was sufficient for it was admitted by the Government that the indictment under which defendant was on trial was deficient.

(Trans. p. 85.) Mr. Fink (for the Government):

> "Now here we have a situation where one indictment No. 11132 was returned and another indictment No. 11785 was returned to correct what we believed to be an error in the first one * * * and I move that the two indictments be consolidated for trial—in other words that No. 11132 and No. 11785 be consolidated."

As a matter of law indictment No. 11132 was fatally defective and insufficient as will be seen by reference to and comparison with indictment No. 11785.

Indictment No. 11785 differed from indictment No. 11132 in that in addition to the allegations contained in the first indictment it contained the allegation

> "Said defendants then and there being persons required to register and pay a tax under the provisions of the act aforesaid as amended and said defendants not then and there having registered under the provisions of the said Act

and not then and there having paid the special tax provided for by the aforesaid Act on the said smoking opium, cocaine and morphine."

These identical words were set out in the overt act pleaded.

The question as to whether or not this indictment is sufficient is no longer an open one in this Circuit. In the case of Gustave Johnson, plaintiff in error, against the United States of America, defendant in error, case No. 4077, opinion by the Hon. Rudkin, Circuit Judge, opinion filed January 21, 1924, this Court held a similar indictment defective:

THE INDICTMENT IN THE JOHNSON CASE READS AS FOLLOWS:

"The indictment in this case charges that the defendants Johnson and Croxel violated the requirements of the Act of December 17, 1914, as amended by the Act of February 24, 1919, 'in that they did knowingly, wilfully, unlawfully and feloniously have in their possession a certain preparation and derivative of opium, to-wit: One can morphine and one finger stall containing approximately a total of 194 grains of morphine, said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and

INDICTMENT No. 11785 READS AS FOLLOWS:

"The defendants wilfully * * * conspired, etc. * * * to commit the acts made offense and crimes by the laws of the United States, to-wit, the Act of Congress of December 17, 1914, as amended February 24th, 1919, that is to say: The defendants did at the time and place aforesaid, knowingly, unlawfully, wilfully and feloniously conspire, combine, confederate and agree together, with, between and among themselves and with divers other persons to the grand jurors aforesaid, unknown, to unlawfully, wilfully and feloniously have in their possession certain narcotic drugs, to-wit, smoking opium, cocaine and morphine,

there having registered under the provisions of the said Act and not then and there having paid the special tax provided for by the aforesaid Act on the said morphine.' ''

said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act and not then and there having paid the special tax provided for by the aforesaid Act on the said smoking opium, cocaine and morphine.''

A comparison of the two indictments set out above side by side shows that they are identical word for word with each other with the exception that the indictment in the instant case has appropriate words charging a conspiracy. We will not at this time burden the Court with any citation of authorities on the proposition discussed in the Johnson case, *supra,* for the opinion in that case is the authority for the proposition that an indictment charging a defendant with possession of narcotics and that he was a person required to register and pay the tax and did not register and did not pay the tax does not state the facts sufficient to charge a crime against the United States.

THE ALLEGATIONS CHARGING A CONSPIRACY DO NOT MAKE THIS A VALID INDICTMENT.

This precise question was under consideration in the case of the United States against Jin Fuey

Moy, 241 U. S. 394, 60 Law. Ed. at 1061, cited with approval by this Court in the case of Johnson against the United States, *supra*. In the Jin Fuey Moy case, Mr. Justice Holmes said:

> "This is an indictment under section 8 of the act of December 17, 1914, chapter 1, 38 Stat. at L. 785, 789. It was quashed by the District Court on the grounds that the statute did not apply to the case. 225 Fed. 1003. The indictment charges a conspiracy with Willie Martin to have in Martin's possession opium and salts thereof, to-wit, one dram of morphine sulphate. It alleges that Martin was not registered with the Collector of Internal Revenue of the District, and had not paid the special tax required. That the defendant, for the purpose of executing the conspiracy, issued to Martin a written prescription for the said morphine sulphate and that he did not issue it in good faith, but knew that the drug was not given for medicinal purposes, but for the purpose of supplying one addicted to the use of opium. The question is whether the possession conspired is within the prohibitions of the Act."

And it was held that the complaint was insufficient.

> "When the criminality of the conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not

in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

Pettibone v. United States, 148 U. S. 197; 37 Law. Ed. 419;

United States v. Cruikshank, 92 U. S. 542; 23 Law. Ed. 588;

Fontana v. United States, 262 Fed. 283;

United States v. Robinson, 266 Fed. 240.

"Where the object to be attained is lawful, it is necessary to set out the means or state the character of the acts by which the design was to be accomplished as a component part of the offense, with such precision and certainty as to show that they were unlawful. So if means are alleged that may create a crime, although in themselves they fall outside of the legal definition of any, the means must be stated that the court may ascertain what crime, if any, they create.

It will not be sufficient to allege in general terms, however, strong, that the purpose to be affected was criminal or unlawful, nor that the means to be used, where their criminal or unlawful character is relied on, were malicious or fraudulent, or unlawful or criminal but those means must be stated in such terms that the court may see that they are unlawful at common law, or by virtue of some statute."

12 C. J. 623 and cases cited.

This Court having held in the Johnson case, that an allegation of "unlawful possession of narcotics", did not state an offense, it necessarily follows that the identical language when used after the words "unlawfully conspire" in an indictment do not ap-

praise the defendants of what crime, if any they have committed, inasmuch as there are 8 different ways to violate the Harrison Narcotic Act.

The insufficiency of the first indictment was raised:

(1) At the time the first witness was sworn by a motion to quash. (Trans. p. 57.)

(2) At the close of Government's case by motion for directed verdict. (Trans. pp. 79 to 81.)

(3) By motion to quash the indictment at close of Government's case. (Trans. pp. 82, 83.)

(4) By motion to quash the indictment at the conclusion of all the testimony. (Trans. p. 107.)

(5) By motion in arrest of judgment. (Trans. p. 116, et seq.)

All of the above motions were by the Court denied and proper exceptions taken thereto.

The insufficiency of the second indictment was raised

(1) By a motion to quash. (Trans. p. 89.)

(2) By a motion to quash at the conclusion of all the testimony. (Trans. p. 107.)

(3) By motion in arrest of judgment. (Trans. p. 117, et seq.)

All of which motions were by the Court denied and proper exception taken thereto.

THE OBJECTIONS WERE TIMELY.

Where the indictment did not state facts sufficient to constitute an offense, defect was not one waived by failure to demur or move to quash the indictment prior to trial and objection might be made even after verdict.

Hardesty v. U. S., 168 Fed. 25, (C. C. A. 6);
Shilter v. U. S., 257 Fed. 724, (C. C. A. 9);
Cohn v. U. S., 258 Fed. 355, (C. C. A. 2);
U. S. v. Leach, 291 Fed. 788.

THE TRIAL COURT ERRED IN PERMITTING AN AMENDMENT TO THE INDICTMENT AND A CONSOLIDATION OF THE INDICTMENT UNDER WHICH THE DEFENDANTS WERE BROUGHT TO TRIAL WITH ANOTHER INDICTMENT AND IN MAKING ITS NUNC PRO TUNC ORDER TO THAT EFFECT.

Under this head we will discuss specifications of error 4 and 6.

U. S. R. S. 1024 provides

"when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class or crimes or offenses which may be properly joined instead of having several indictments the whole may be joined in one indictment on several counts; but if two or more indictments are found in such cases the Court may order them to be consolidated."

A careful examination of all the cases recorded, wherein this statute has been construed, fails to dis-

close a single instance where the consolidation was ordered after the trial had been commenced; in all of them it was prior to trial.

The motion of the district attorney to consolidate for trial cases No. 11132 and No. 11785 (Trans. p. 85) was made after the Government had rested its case in chief and after motions to direct the jury for an instructed verdict and to quash the indictment had been made and renewed. The order of the Court is found on page 88 of the transcript; and is as follows:

> "The motion to dismiss the indictment will be denied. The motion to consolidate the two indictments for trial and to proceed will be granted nunc pro tunc as of the beginning of the trial. It is true that the exact question has not been presented."

To say the least, the procedure here invoked by the district attorney is not only novel but it is a most radical departure from the administration of criminal law as it has been followed from time immemorial.

Two propositions are involved:

1. The power to amend an indictment returned by a grand jury;

2. The power to amend an indictment after trial to conform to the proof and the making of a *nunc pro tunc* order as of the date of the beginning of the trial.

The mere statement of the propositions carries with it their refutation.

If this novel procedure could be grafted onto the law there would be nothing to prevent a district attorney finding his indictment defective after putting in his proof, reconvening a grand jury and procuring a new indictment, arraign the defendant and then proceed upon the consolidated indictment and by procuring a *nunc pro tunc* order, proceed with the trial on an entirely different charge than the first indictment contained. It is useless to attempt to cite the Court any authority as to the fallacy of any such procedure as it is "Hornbook" law that no such practice as "amending to conform to proof" exists in criminal cases. It may apply in the trial of civil causes.

The Court charged the jury (Trans. p. 107):

> "In this case there are two indictments. These indictments, however, charge but a single offense and upon them you can render but a single verdict of either guilty or not guilty. That is to say, you are, for the purpose of your verdict, to consider the second indictment as a mere amendment or correction of the first."

To which due exception was taken by the defendant by exception to charge at page 115 of the transcript, assignments of error at page 44 of transcript.

Neterer, D. J., said in United States v. Monday, 211 Fed. 537:

"An indictment is a criminal charge returned under the solemnity of an oath by grand jury charging a person with a violation of law. There is no act of Congress authorizing amendments to an indictment. The fifth amendment to the Constitution provides that no person shall be prosecuted for an offense for an infamous crime except upon indictment."

In ex parte Bain, 121 U. S. 1, held.

"The declaration of Article V of the Amendments to the Constitution, that 'no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury' is jurisdictional; and no court of the United States has authority to try a prisoner without indictment or presentment in such cases.

The indictment here referred to is the presentation to the proper court, under oath, by a grand jury, duly impaneled, of a charge describing an offense against the law for which the party charged may be punished.

When this indictment is filed with the court, no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a resubmission of the case to the grand jury. And the fact that the court may deem the charge immaterial, as striking out of surplus words makes no difference. The instrument as thus changed is no longer the indictment of the grand jury which presented it.

This was the doctrine of the English courts under the common law. It is the uniform ruling of the American courts, except where statutes prescribe a different rule; and it is the imperative requirement of the provision of the Constitution above recited, which would be of little avail if an indictment once found can

be changed by the prosecuting officer, with consent of the court, to conform to their views of the necessity of the case.

Upon indictment so changed the court can proceed no farther. There is nothing (in the language of the Constitution) which the prisoner can 'be held to answer.' "

We will not burden the Court further with any citation of authorities on this point. The district attorney had conceded that his first indictment was defective and then asked leave to consolidate the first defective indictment with another defective indictment. We urge that two defective indictments either consolidated or one to be the amendment of the other can not make one good indictment.

THE EVIDENCE DOES NOT PROVE, NOR EVEN TEND TO PROVE, THAT THERE EVER WAS A CONSPIRACY. (Assignment of errors 3-7.)

The trial Court instructed the jury:

"you are instructed in the first place that under the Act of Congress mentioned in this indictment, it is a crime to have in possession opium, morphine, or cocaine, unless the person so having in possession has registered and paid the prescribed tax. There is no claim or pretense here that either of these defendants has registered or paid the tax, and therefore the possession of these drugs by either of them would constitute a crime against the United States. It is not necessary for the Government to show failure to register or to pay the tax if it shows possession. In this connection,

> I instruct you that if you find that either of the defendants had in his possession a baggage check entitling him or them to the possession of the suitcase containing any of these drugs, then the possession of such check with knowledge of the contents of the suitcase and intent to procure the suitcase is, in law, the possession of the drugs. But these defendants are not charged with having the drugs in their possession, they are charged with a conspiracy so to do.
>
> You are instructed that a combination, agreement, and conspiracy, which has as its object the having of these drugs in possession without registering or paying a tax is a crime against the United States. That is to say it constitutes the crime of conspiracy."

A proper exception to this portion of the charge was taken at the conclusion of the charge (Trans. p. 115) in the presence of the jury. An almost identical charge to the jury was condemned by this Court in Johnson v. the United States, *supra,* and without further comment we would state that under all the authorities it is prejudicial, does not state the law and in and of itself would constitute reversible error.

Realizing the rule of this Court that it will not inquire into where the weight of the evidence lies and that the verdict of the jury will be upheld if there is any substantial testimony to support it, taking the evidence as a whole, there is not a scintilla of evidence to support a finding that either of these two defendants ever conspired with each

other or communicated with each other by word of mouth or otherwise in regard to the unlawful possession of narcotics. The only thing proved by the Government was that somebody in Oakland shipped a suitcase containing narcotics to someone in Reno, Nevada. It is elementary that a conspiracy cannot be proven by simply establishing an overt act, either lawful or criminal. In this case the overt act is a lawful one. Johnson case, *supra.*

"To establish a conspiracy to violate a certain criminal statute, the evidence must convince the jury that defendants did something other than participate in the substantive offense which is the object of the conspiracy. To illustrate, A, B and C may each have purchased this whiskey from D, E and F, and may have carried it from the freight car in which it arrived, yet not have been in the conspiracy to which D, E and F were parties."

U. S. v. Heitler, 274 Fed. 405.

Gilbert, C. J., in Peterson v. United States, 274 Fed. 930, said:

> "The contention of the plaintiff in error that there was no evidence to prove a conspiracy must be sustained. In the bill of exceptions which is certified to contain all the evidence offered or admitted on the trial which in any manner concerns the plaintiff in error or relates to any of the exceptions or rulings of the court therein, there is testimony that altered stamps were found in the possession of the plaintiff in error, and that he pleaded guilty to an indictment which charged him with hav-

> ing in his possession such altered stamps with the intention to sell and pass them. But there is no testimony or evidence of any kind to show that he conspired with his co-defendant (who was also found guilty) or with anyone to steal or alter such stamps, or that there was any concert of action between the plaintiff in error and any of the defendants, or that there was a conspiracy."

Applying the reasoning of the last case to the instant case: Assuming, without conceding, that either of the defendants had the possession of narcotics, there is no testimony or evidence of any kind to show that he conspired with his co-defendant or with anyone to possess narcotics (which would be no crime) or that there was any concert of action between plaintiff in error and any of the defendants or that there was a conspiracy.

In Simpson v. United States, 289 Fed. p. 191, Rudkin, C. J., in his dissenting opinion, says:

> "The charge was a conspiracy to commit a crime, and there was no direct testimony to establish such charge. The conclusion of the majority seems to be based upon the erroneous assumption that a conspiracy to commit a crime must necessarily exist whenever two or more persons are in anywise implicated in its commission. But, if this be true, Section 332 of the Criminal Code (Compiled Stats. Sec. 10506), declaring, 'Whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces, or procures its commission is the principal', is without legal significance."

Other cases holding evidence insufficient to establish a conspiracy:

Stager v. United States, 233 Fed. 510;
State v. Messner, 86 Pac. 636 (Wash.);
Farmer v. U. S., 223 Fed. p. 903, par. 3-4, p. 907.

Not one word of testimony in this case connecting up the one defendant with the other in the relation of co-conspirators. Surely, if there ever was a case in which the Government failed to prove a conspiracy, it is the instant one. To say that a conspiracy had been proven in this case, by simply showing that a shipment of narcotics had been made from one point to another, would mean that whenever two persons are concerned in a crime, that of necessity would prove a conspiracy.

Fortunately under our law it takes more than that to prove a conspiracy. A most casual reading of the record discloses that these defendants have been most grievously wronged. It is a case of mistake of the Government agents, too zealous to detect crime and in making a premature arrest, have laid the blame on innocent persons, one a young lad who had recently come to America and the other an employee in the railroad yards at Sparks, Nevada, and neither of these men had ever been known to or had the reputation for dealing in narcotics. It would have been a simple matter for the Government agents to have permitted the person to whom the letter and baggage check was addressed to claim

the suit case and then make the arrest. On this sort of flimsy testimony two men have been convicted of the crime of conspiracy by a jury. In these days of the narcotic evils, it is notorious that any person charged with a violation of those laws which tend to discourage the use of these insidious and health destroying enemies of humanity, has a scant chance for a fair trial at the hands of the average jury, because of their abhorence of persons so charged.

> "A judgment should not be reversed for mere technical error, but to condone such an error as this is subversive of the constitutional right of trial by jury." (Rudkin, C. J., in Simpson v. U. S., *supra.*)

In this case the record shrieks with error. These errors are prejudicial and anyone of them is sufficient to warrant this Court in setting aside the conviction and sentence.

In conclusion we repeat:

(1) The 1st indictment is insufficient.

(2) The 2nd indictment is insufficient.

(3) The Court erred in permitting an amendment or consolidation.

(4) The Court erred in its instructions to the jury.

(5) There is no evidence that either of the defendants conspired to violate any law.

And for any and all of these grounds the judgment should be reversed.

Dated, San Francisco,
February 11, 1924.

Respectfully submitted,

J. H. Sapiro,
C. A. A. McGee,
Attorneys for Plaintiff in Error,
Gee Sue Tom.